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**91-1558**

Supreme Court, U.S.
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CASE NO. 431-7200 D.D.
THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA
OCTOBER TERM 1991

JOAQUIN ORTEZ-MIRANDA — PETITIONER

vs.

UNITED STATES OF AMERICA — RESPONDENT

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. In a criminal trial, the trial judge has an independent duty to conduct a direct inquiry of the Defendant concerning the Defendant's waiver of his constitutional right to testify in his own defense, especially when that Defendant is a non-citizen who does not speak the language in which the proceedings are conducted.

2. In a conspiracy prosecution, the trial court should instruct the jury on the necessary element of "overt act" and the court's failure to do so is plain error.

3. The trial court is required to conduct an in camera hearing when evidence is offered by the government concerning a conversation with an unidentified informant which results in conduct which had been repeatedly refused by the Defendant to discern the circumstances of that conversation prior to deciding that the prosecution can withhold the identity of that informant and the substance of that conversation from the Defendant.

4. When an alleged co-conspirator cooperates with the government in facilitating an arrest and testifying during trial, the jury should be given a specific instruction as to the weight, bias, credibility and benefit to be gained by the coconspirator under the Sentencing Guidelines in providing substantial assistance and an instruction concerning an accomplice is insufficient.

5. In a case involving discussions concerning alleged multiple conspiratorial acts, only one of which is the subject of prosecution, the court is required to give an instruction concerning the jury's duty to reach a verdict only on the specific crime charged in the indictment and the failure to do so is plain error.

6. The trial court is required to instruct the jury that a conviction cannot be based on conjecture and that there is never a shift of the burden of proof to the Defendant to prove his innocence.

TABLE OF CONTENTS

*Page*

Questions for Review ..... 1
List of Parties ..... 2
Table of Authorities ..... 3
Official and/or Unofficial Opinions ..... 4
Statement of Jurisdiction ..... 4
Constitutional Provisions and Statutes ..... 4
Statement of the Case ..... 5
Argument ..... 7
Appendix ..... 15

## LIST OF PARTIES

The parties to the proceedings are those specifically named in the caption of this case.

There are no parent companies, non-wholly or wholly owned subsidiaries.

## TABLE OF AUTHORITIES

*Page*


Brady v. Maryland, 373 U.S. 83 (1963) ..... 10
Brooks v. Tennessee, 406 U.S. 605 (1972) ..... 7
Johnson v. Zerbst, 304 U.S. 458 (1938). ..... 8
Jones v. Barnes, 463 U.S. 745, 751 (1983) ..... 7
Nix v. Whiteside, 475 U.S. 157, 164 (1986). ..... 7
Rock v. Arkansas, 483 U.S. 44 (1987).. ..... 8
Roviaro v. United States, 353 U.S. 53 (1957) ..... 10
U.S. v. Hart, 640 F. 2d 856 (6th Cir., 1981) ..... 13
U.S. v. McGee, 584 F. 2d 905 (6th Cir., 1988). ..... 12
U.S. v. McManus, 560 F. 2d 747 (6th Cir., 1977) ..... 10,11
U.S. v. Pope, 561 F. 2d 663 (6th Cir., 1977) ..... 9
U.S. v. Robinson, 651 F. 2d 1188 (6th Cir., 1981). ..... 13
U.S. v. Sharp, 778 F. 2d 1182 (6th Cir., 1985). ..... 10
U.S. v. Teague, 908 F. 2d 752 (11th Cir., 1990, rehearing en banc pending). ..... 8
U.S. v. Thompson, 533 F. 2d 1006 (6th Cir., 1976). ..... 9

## OFFICIAL AND/OR UNOFFICIAL OPINIONS

There are no official or unofficial opinions rendered in this case.

## STATEMENT OF JURISDICTION

A. Date of Judgment.

This Petition seeks review and reversal of an Entry of Judgment entered on November 21, 1990 in the United States District Court for the Eastern District of Kentucky from which a timely appeal was taken to the United States Court of Appeals for the Sixth Circuit. Review and reversal is sought from the order filed by the United States Court of Appeals for the Sixth Circuit on October 1, 1991 affirming that judgment.

B. Statutory provision conferring jurisdiction before this honorable Court is 28 U.S.C. Section 1254 (1).

## CONSTITUTIONAL PROVISIONS AND STATUTES

### FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### 21 U.S.C. 846
### ATTEMPT AND CONSPIRACY

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. 843(b)
PROHIBITED ACTS
COMMUNICATION FACILITY

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter 11 of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

## STATEMENT OF THE CASE

### A. Criminal Prosecution Proceedings:

This Petition for a Writ of Certiorari seeks review of a conviction on a criminal indictment returned and filed at Covington, Kentucky in the United States District Court for the Eastern District of Kentucky. Federal jurisdiction was based upon a three count indictment which was returned and filed on July 11, 1990. (R. 1) Count One charged the Defendant with violation of 21 USC Section 846 alleging his participation from February, 1989 to May, 1990 in a conspiracy to distribute and possess a quantity of heroin in the approximate amount of two kilograms and to knowingly and unlawfully import that controlled substance into the United States. Count Two and Count Three charged the Defendant with the use of a telephone in committing and facilitating the conspiracy alleged in Count One. Those two separate counts allegedly occurred on February 14, 1990 and May 24, 1990 in Kenton County and Campbell County respectively. Defendant is a non-English speaking person; his native language is Spanish. An interpreter and public defender were appointed for him. (R. 2; R. 3) After exchange of discovery information and two continuances, the criminal trial went forward on November 19, 1990 and concluded on November 21, 1990 resulting in a guilty verdict on all counts. (R. 26) After ruling upon

objections to the pre-sentence investigation, the Defendant was sentenced pursuant to Guidelines to consecutive sentences totalling 150 months, a $150.00 mandatory special assessment and supervised release of five years with certain conditions including that the Defendant not re-enter the U.S. during the period of his supervised release. (R. 29) On January 22, 1991, a Notice of Appeal was timely filed. (R. 32) Defendant then engaged the services of another attorney to represent him in this appeal which sought to reverse the conviction below.

On July 21, 1991 a Notice of Appeal was timely filed in the United States Court of Appeals for the Sixth Circuit. (R. 32) On October 1, 1991, the United States Court of Appeals for the Sixth Circuit issued an order affirming the judgment of conviction and issued the mandate on October 24, 1991.

### B. Statement of the Facts

Preface: The factual statement is convoluted due to the fact that there were multiple conversations over the telephone between government agents, co-conspirators, and the Defendant in this case. The evidence of the purported conspiracy was presented by two convicted coconspirators who were awaiting sentencing for their acts of importing and distributing heroin and certain aspects of their testimony was contradictory.

Co-conspirators Sylvia Krull and Donald Cole testified that in the summer of 1989 they went to Acapulco to establish a source for obtaining controlled substances which they wished to import into the United States and distribute. The Defendant did not know their plan concerning importation. (R. 2 1, pg. 335) Krull speaks Spanish; Cole does not. Cole and Krull testified that they were ultimately placed in touch with the Defendant who purportedly provided them with heroin in exchange for a partial payment, the balance of which was to be provided later. Cole and Krull brought the contraband to Dayton, Ohio where they were eventually sold it to undercover agents. The Defendant never knew of the plan or method of importation or distribution. (R. 24, pg. 353) Cole pled guilty to one Count of conspiracy involving forty-one (41) pounds of marijuana and twelve (12) kilograms of cocaine. (R. 23) Krull pled guilty to one Count and has another indictment presently pending (R. 24, pg. 345) Although Krull never called the Defendant

before her arrest, (R. 24, pg. 339) after her arrest, she initiated multiple conversations over the telephone in cooperation with law enforcement authorities involving the Defendant in an attempt to entice Defendant to return to the jurisdiction of the United States to obtain the purported balance of payment. In these conversations, government agents stated a willingness to purchase additional controlled substances from Defendant. The Defendant repeatedly refused to be involved in importation of controlled substances and repeatedly refused to return to the jurisdiction. Almost forty (40) such telephone conversations occurred, only two of which were alleged by the prosecution in the Second and Third Counts of the indictment. [Exhibit 3-B, C, D of February 14, 1990 (R. 23, pg. 101-102) and Exhibit 7-B of May 24, 1990 (R.23, pg. 106)] Ultimately, based upon some unknown personal contact by an unknown person, the Defendant did return to the jurisdiction of the United States, was arrested and charged with the crimes in the indictment.

## ARGUMENT

1. First Question for Review

**In a criminal trial, the trial judge has an independent duty to conduct a direct inquiry of the Defendant concerning the Defendant's waiver of his constitutional right to testify in his own defense, especially when that Defendant is a non-citizen who does not speak the language in which the proceedings are conducted.**

As a corollary to the Fifth Amendment privilege against compelled testimony, the Defendant has a right to testify on his own behalf in the defense of the criminal prosecution brought against him. Nix v. Whiteside, 475 U.S. 157, 164 (1986) It is the Defendant who has the ultimate authority to make the decision as to whether or not to testify. Jones v. Barnes, 463 U.S. 745, 751 (1983) In addition to his Fifth Amendment rights, whether the Defendant is to testify is an important tactical decision and is frequently made by his counsel. Brooks v. Tennessee, 406 US 605 (1972)

The Defendant is a citizen of Mexico and is not able to converse in English. An interpreter was provided by the government to assist in the proceedings. No independent inquiry was made by the court as to whether or not the defendant wished to testify in his own defense. It is

incumbent upon the trial court to ascertain whether or not a Defendant is knowingly and willingly waiving his constitutional right to testify. Rock v. Arkansas, 483 U.S. 44 (1987)

All Defendants brought before a court in the United States charged with the crime under its laws and statutes have the same constitutional rights regardless of citizenship. The Defendant is a non-citizen. He was brought before the court for the first time on charges of conspiring to import a controlled substance. Testimony was given by government agents and co-conspirators against him. No witnesses were called in his defense and he did not testify. The court made no independent inquiry as to the waiving by the Defendant of his constitutional right to testify and present evidence in his own defense. Accordingly, there is no indication that the Defendant knowingly and voluntarily waived those rights. "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. 458 (1938) The court is compelled by the U.S. Constitution to independently ascertain the knowledge and willingness of a waiver by the Defendant, especially in those instances where the Defendant is a non-citizen who does not speak the language in which the proceedings transpire. The trial court failed to ascertain whether or not the Defendant was aware of his right to testify, wanted to testify and was prevented from doing so. It is a right so fundamental that is cannot be waived by counsel over his objection and the trial court failed to ascertain Defendant's knowing and willing acquiescence to the apparent decision made by his court-appointed counsel. Failure to do so is error that violates Defendant's constitutional rights. U.S. v. Teague, 908 F. 2d 752 (11th Cir., 1990, rehearing en banc pending)

2. Second Question for Review

**In a conspiracy prosecution, the trial court should instruct the jury on the necessary element of "overt act" and the court's failure to do so is plain error.**

Count One of the Indictment alleges that the Defendant was a participant in a criminal conspiracy. County Two and Three of the Indictment have to do with telephone conversations in which this purported conspiracy was discussed. The trial court did not instruct the

jury on the requirement for the Defendant to have an overt act as described in the conspiracy indictment. This Court has not resolved the conflict among the circuit courts and trial courts concerning the necessity of an "overt act" in a conspiracy prosecution. The acts stated in the indictment concern importation. The evidence is unequivocal that this Defendant did not participate in any importation himself; rather, he specifically declined to participate in a scheme involving importation. Accordingly, an overt act on his part was necessary as an element of the conspiracy. U.S. v. Thompson, 533 F. 2d 1006 (6th Cir., 1976) Although the court did charge on the first two elements of conspiracy, it failed to charge with respect to the necessity of the proof of an overt act. This failure is plain error and on that basis the case should be reversed. U.S. v. Pope, 561 F. 2d 663 (6th Cir., 1977)

3. Third Question for Review

**The trial court is required to conduct an in camera hearing when evidence is offered by the government concerning a conversation with an unidentified informant which results in conduct which had been repeatedly refused by the Defendant to discern the circumstances of that conversation prior to deciding that the prosecution can withhold the identity of that informant and the substance of that conversation from the Defendant.**

There were repeated efforts by law enforcement authorities to entice, conjole, and otherwise motivate the Defendant to return to the United States with or without controlled substance in his possession. The Defendant repeatedly refused to do so. Nevertheless, on the date of his arrest, a conversation occurred between law enforcement authorities and the Defendant across the border. At that time, the Defendant persisted in his refusal to participate in illegal activity or return to the United States. The law enforcement authorities then arranged for an unidentified informant to cross the border to Mexico to meet with the Defendant. As a result of that meeting and a conversation, the substance of which remains confidential, the Defendant crossed the border into the United States and was arrested. (R. 24, p. 380) At his arrest, he was not involved in any criminal activity.

The defense had made a request for the identity of the informant and wished to know the subject matter of that conversation. (R. 17) The

prosecution declined to provide that information (R. 18) and the judge upheld that declination. This was error. At a minimum, the court should have conducted an in camera hearing concerning the identity of that informant, his or her position, and the subject matter of any conversation with the Defendant. U.S. v. McManus, 560 F.2d 747 (6th Cir., 1977)

Although the government does possess a privilege to withhold the identity of confidential informants in undercover operations, the privilege is limited. Disclosure of a confidential informant's identity is required when it is relevant and helpful to the defense of the accused or essential to a fair trial. Roviaro v. United States, 353 U.S. 53 (1957) The court is tasked with balancing the public interest in protecting the flow of information against the Defendant's right to prepare his defense. Roviaro v. United States, supra, p. 62

District courts conduct an in camera review to assess the relevance and possible helpfulness of the identity of confidential informants to the defense. United States v. Sharp, 778 F. 2d 1182 (6th Cir., 1985) The relevancy of the identity of the informant in this case is obvious since it resulted in an abrupt and contrary change in the Defendant's position with respect to further activity including entering the United States. Accordingly, the informant was an "active participant' in the Defendant's conduct. United States v. Sharp, supra, p. 1186 n.2

The Defendant is a Spanish speaking Mexican citizen. Whether or not there are any aspects of the conversation which were exculpatory were unavailable to defense counsel appointed at government expense. Accordingly, the Defendant could not fully exercise his constitutional rights to confront his accusers. Brady v. Maryland, 373 U.S. 83 (1963) The court should have ascertained that information in order to have appropriately ruled on its confidentiality. Failure to do so is reversible error.

4. Fourth Question for Review

**When an alleged co-conspirator cooperates with the government in facilitating an arrest and testifying during trial, the jury should be given a specific instruction as to the weight, bias, credibility and benefit to be gained by the coconspirator under the Sentencing Guidelines in providing substantial assistance and an instruction concerning an accomplice is insufficient.**

This prosecution is grounded upon the indictment of the Defendant as a Conspirator. The only testimony provided in that regard was by two individuals who purportedly participated in that conspiracy and, in fact, purchased a controlled substance and imported it. These two Defendants/Co-Conspirators had previously pled guilty and were awaiting sentence. While awaiting sentence, they were cooperating with the government in providing telephone numbers and initiating and participating in telephone conversations with the Defendant. These coconspirators testified at trial. Their evidence was uncorroborated. U. S. v. McManus, supra,

No instruction was provided to the jury concerning the Sentencing Guidelines and the impact which the Co-Conspirators cooperation may or may not have had on the sentence ultimately imposed upon them. Rather, the court gave a "boilerplate" instruction concerning accomplices. (R. 25 p. 437) Since the two witnesses were admitted conspirators who could have been seeking mitigated sentences based upon substantial assistance provided in the prosecution of this Defendant, it was reversible error for the court to present an instruction concerning an accomplice.

This Court has given no guidance to the courts below with respect to jury instructions concerning uniform sentencing guidelines and the impact on the potential sentence by substantial assistance and acknowledgment of responsibility which an individual may receive upon sentencing. This is particularly so in incidents involving conspiracy as contrasted to an accomplice.

The trial court in this prosecution should have instructed the jury concerning the weight, bias, credibility, and specific benefit to be gained by the giving of their testimony. The bias presented by their testimony in light of any mitigating factors under the Sentencing Guidelines should have been described to the jury so that appropriate weight could have been given to their testimony. Failure to do so constitutes reversible error.

5. Fifth Question for Review

**In a case involving discussions concerning alleged multiple conspiratorial acts, only one of which is the subject of prosecution, the court is required to give an instruction concerning the jury's duty to reach a verdict only on the specific crime charged in the**

**indictment and the failure to do so is plain error.**

During the trial of this case, close to forty (40) telephone conversation transcripts were read into evidence and those transcripts were then admitted into evidence and the jury provided with them during their deliberations. The telephone conversations occurred in Spanish and the transcripts were ruled to be translations of those conversations. They were provided to the Defendant's counsel pursuant to the Jenck's Act only minutes before presentation to the jury. Only two of those conversations were the subject matter of Counts Two and Three of Indictment. The conspiracy upon which this prosecution was based had already occurred. It was alleged that additional discussions occurred about the "balance due" from the acts alleged in Count One of the Indictment. The conversations involved in discussions initiated by government agents concerning the Defendant's willingness or unwillingness to participate in other illegal activity involving importation of controlled substance was the subject matter of the telephone conversation transcripts. The jury was misled by inflammatory conversations, none of which led to the establishment of a conspiracy sufficient for indictment. U.S. v. McGee, 584 F. 2d 905 (6th Cir., 1988)

These conversations did not include multiple acts in furtherance of one conspiracy. In fact, the conspiracy charged in the indictment had already taken place and the conversations with government authorities consisted of attempts by them to establish additional conspiracies by the Defendant to import other controlled substances. The Trial Court should have clarified this aspect by an appropriate instruction as to how the jury should address the discussions contained in the transcripts since the jury could find only with respect to the specific crime charged in the indictment. Failure by the trial court to do so is plain error.

6. Sixth Question for Review

**The trial court is required to instruct the jury that a conviction cannot be based on conjecture and that there is never a shift of the burden of proof to the Defendant to prove his innocence.**

There is conflict between and among the Circuits with respect to how the jury should be charged in those instances where the burden of proof may shift. The specific charge to the jury that the burden of proof

never shifts is debated because of some purported confusion that this legal concept tends to cause to jurors. For the accused in the Courts of the United States, the burden of proving innocence never shifts. The jury should be so charged.

In this case, the Defendant did not take the witness stand nor did he present any witnesses. The trial court failed to inform the jury that a conviction cannot be based on conjecture and the Defendant did not have to prove his innocence. U.S. v. Robinson, 651 F. 2d 1188 (6th Cir., 1981); U. S. v. Hart, 640 F. 2d 856 (6th Cir., 1981) To the contrary, the court repeated instructions concerning the right of the Defendant to take the witness stand, thereby highlighting his failure to do so.

The only evidence of conspiracy for which the Defendant was charged was based upon testimony presented by two co-conspirators who had previously pled guilty but were awaiting sentencing. Accordingly, that testimony was vague, non-specific, and contradictory with respect to whether or not the appropriate elements of a conspiracy were present. The jury was forced to deliberate without the appropriate standard by which they were to reach their verdict. The trial court should have instructed them concerning the Defendant's constitutional right to a presumption of innocence and that the verdict could not be based upon conjecture. Failure to so instruct constituted prejudicial error and the case should be reversed.

## CONCLUSION

This Court is continually faced with requests by individuals convicted of crimes, secondary to the War on Drugs, to give the individual citizens and non-citizens of the United States guidance as to their constitutional rights. The lower courts of the Federal Judiciary approach the prosecution of individuals during this "War" from various perspectives. Those courts need guidance from the highest court of the land in order to insure that 'collateral damage' involving conviction of individuals without proper preservation of their constitutional rights is prohibited. Unlike a military war, which can accept collateral damage with regret, the War on Drugs can accept no collateral damage concerning fundamental constitutional rights.

For all the reasons stated hereinbefore, Petitioner respectfully requests this Court to accept certiorari of this case and allow the parties to present briefs on the merits.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to Solicitor General, Department of Justice, Washington, D.C. 20530 and Jacquelyn Jess, Esq., Assistant U.S. Attorney, P.O. Box 72, Covington, Kentucky 41012 by ordinary U.S. Mail this 30th day of December 1991.

_____

HARRY P. HELLINGS, JR., ESQ.

the defendant?

R. DARPEL: Judge, we have no proof to present.

THE COURT: Very well. Please be seated. Ladies and gentlemen of the jury, now that you have heard the evidence, it becomes my duty to give you instructions by the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in instructions of this Court, and to apply the rules of law as given to the facts as you shall find them from the evidence in the case.

Counsel have quite properly referred to some of the governing rules of law. If, however, any difference appears to you between the law as stated by counsel and that stated by the Court in these instructions, you of course are to be governed by these instructions.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law as stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict on anything but the evidence in the case.

Justice through trial by jury must always depend on the willingness of each juror to seek the truth as to the facts from the same evidence presented to all the jurors, and to arrive at a verdict by applying the same rules of law as given in the instructions of the Court.

Now I tell you, at this particular time let me tell you that the admonitions I have previously given you not to make up your minds about the case and not to discuss the case amongst yourselves is withdrawn as of the time you are sent back upstairs to deliberate, and you are directed to arrive at the verdict, if at all possible, in line with these instructions which I will give to you. These also will be in written form so you can refer to them.

If I should comment on the evidence, you are not to consider anything I may say as being all of the evidence, the most important

evidence, or the most significant evidence upon any given point. simply my statements should not be considered by you, other than my instructions of the law.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "not guilty" plea of the defendant. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of consequences.

You, as jurors, are the sole judges of the facts in this case, and you are also the sole judges of the credibility of the witnesses. You are to decide this case solely on the evidence submitted here in court, and the law given to you by the Court, and not upon any knowledge which may be brought to your attention otherwise than during the trial of this case. You are not to consider any evidence which has been ruled inadmissible or stricken by the Court, and you are not to speculate on the reasons for the rulings of the Court on objections to testimony or in striking or excluding testimony.

It is the duty of the attorneys on both sides to make their objections, to protect the interest of their clients, and you are not to infer in any manner that either side was attempting to withhold any evidence from you as a result of objecting to the evidence, whether it was subsequently admitted by the Court or subsequently ruled inadmissible.

You should keep your minds clear of bias, prejudice, or sympathy, and you should not be swayed either for or against the defendant by either such consideration.

You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should consider or carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he or she impresses you as having an accurate recollection of those facts in these matters. And consider also any relation each witness may bear to either side of the case; the manner in which each witness

might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see it or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from an innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

As you know, the defendant has pleaded not guilty to the crimes charged in the indictment. The indictment is not evidence of guilt. It is just a formal way the government tells the defendant what crime he is accused of committing. It does note raise even a suspicion of guilt.

Instead, the defendant starts with a clean slate, with no evidence at all against him, and the law presumes that he is innocent. This presumption of innocence stays with him unless the government presents evidence here in court that overcomes the presumption and convinces you beyond a reasonable doubt that the defendant is guilty.

This means that the defendant has no obligation to present any evidence at all, or to prove to you in any way that he is innocent. It is up to the government to prove that he's guilty, and this burden stays on the government from start to finish. You must find the defendant not guilty unless the government convinces you beyond a reasonable doubt that he is guilty.

The government must prove each and every element of the crimes charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.

Proof beyond a reasonable doubt means proof which is so convincing that you would rely and act upon it without hesitation in making the most importance decisions in your own lives. If you are convinced that the government has proved the defendant guilty beyond

a reasonable doubt, say so by returning a guilty verdict. If you are not so convinced, say so by returning a not guilty verdict.

As I previously instructed you, the law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilty may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

There are two types of evidence which you may find the truth as to the facts of a case - direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is any greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

Title 21, United States Code, Section 846 makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would be a violation of Title 21, Section 841, subparagraph (a), subparagraph (1). Section 841(a)(1) makes it a crime for anyone to knowingly possess heroin with intent to distribute it. Title 21, United States Code, Section 952(a), makes it a crime for anyone to knowingly import and bring heroin into the United States.

So, under the law, a "conspiracy" is an agreement or a kind of "partnership in criminal purposes" in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the government to prove that all of the people named in the indictment were members of the scheme, or that those who were members had entered into any formal type of agreement. Also, because the essence of a conspiracy offense is the making of the scheme itself, it is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful purpose.

What the evidence in the case must show beyond a reasonable

doubt is:

First: That two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and

Second: that each defendant knowingly and willfully became a member of such conspiracy.

A person may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all the other alleged conspirators. So, if a defendant has an understanding of the unlawful nature of a plan, and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict him for conspiracy even though he had not participated before and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in such way as to advance the purpose of one, does not thereby become a conspirator.

Title 21, United States Code, Section 843(b), makes it a crime for anyone to knowingly use a communication facility to commit or facilitate commission of another controlled substance offense.

For you to find the defendants guilty of Counts 2 and 3 of this indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant used the communication facility as charged: and

Second: That the defendant used the communication facility with the intent to commit or facilitate the commission of the offense of conspiracy to violate the drug laws of the United States.

The term "communication facility" includes mail, telephone, wire, radio, and all other means of communication.

To "facilitate" the commission of an offense means to aid or assist in the commission of that offense.

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident other innocent reason.

The purpose of adding the word "knowingly" is to insure that no one will be convicted for an act done because of mistake or accident or

other innocent reason.

As stated before, with respect to an offense such as charged in this case, specific intent must be proved beyond a reasonable doubt before there can be a conviction.

The term "distribute" means to deliver... a controlled substance to the possession of another person, which in turn means the actual, constructive or attempted transfer of a controlled substance ...

You are instructed as a matter of law that heroin is a controlled substance. You must ascertain whether or not the material in question was in fact heroin. In so doing, you may consider all the evidence in the case which may aid the determination of that issue, including the testimony of any expert or any stipulations entered into by the parties either to support or dispute the allegation that the material in question was heroin.

In Count 1 of the indictment it is alleged that a particular amount of quantity of heroin was involved. The evidence in the case need not establish that the amount or quantity of heroin was as alleged in the indictment, but only that a measurable amount of heroin was in fact the subject of the acts charged in the indictment.

The crimes charged against the defendant in this case are serious crimes which require proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act or acts which the law forbids, purposely intended to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent and motive should never be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which of the act is done or omitted.

Personal advancement and financial gain are two well-recognized motives for much of human conduct. These laudable motives may prompt one person to do voluntary acts of good while another to do voluntary acts of crime.

Good motive alone was never a defense where the act done or omitted was a crime. So the motive of the accused is immaterial except insofar as the evidence of motive may aid the determination of state of mind or intent.

Intent ordinarily may not be proved directly because there is no

way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done and knowingly omitted. As I have said, it is entirely up to you to find what facts to find from the evidence.

In this case the government called as one of its witnesses alleged accomplice, named as a co-defendant in the indictment, with whom the government has entered into a plea agreement providing for the dismissal of some charges and a lesser sentence than the co-defendant would otherwise be exposed to for the offense to which the co-defendant plead guilty. Such plea bargaining has been proved as lawful and proper, and is expressly provided for in the rules of this court.

An alleged accomplice, including one who entered into a plea agreement with the government, is not prohibited from testifying. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. You should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt The fact that an accomplice has entered a plea of guilty to the offense charged is not evidence, in and of itself, of the guilt of any other person.

A separate crime is charged in each count in this indictment. Each count and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the crimes charged should not control your verdict as to any other.

Various exhibits have been identified as typewritten transcripts and translations from Spanish into English of the oral conversations which can be heard on the tape recordings received into evidence as exhibits. The transcripts also purport to identify the speakers engaged in such conversations.

I have admitted the transcripts for the limited and secondary purposes of aiding you in following the content of the conversations as you listen to the transcripts being read, particularly since the tape recording are entirely in Spanish, and also to aid you in identifying the

speakers.

However, you are specifically instructed that whether it is transcripts correctly or incorrectly reflect the content of the conversations or the identity of the speakers is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the preparation of the transcripts, and if you should determine the transcripts are in any respect incorrect or unreliable, you should disregard them to that extent.

The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the court, and should never be considered by the jury in any way, in arriving at a impartial verdict as to the guilt or innocence of the accused.

The verdict should represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence in the with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. Remember at all times, you are not partisans. You are good judges — judges of the facts. Your sole interest is to seek the truth of the evidence in the case.

Now, ladies and gentlemen, we will send to you to the jury room the original of this indictment. We also have for you a form of verdict. After you have elected one of your number foreman or forewoman, and after you have arrived at a unanimous verdict, the foreman or forewoman, as the case may be, should check either guilty or not guilty, and sign his or her name at the bottom reflecting the date there next to your name .

The form of verdict simply says United States of America versus Joaquin Ortez-Miranda; we, the jury, find the defendant, Joaquin Ortez-Miranda:

Count 1, guilty or not guilty.

Count 2, guilty or not guilty.

Count 3, guilty or not guilty.

A place for the person to sign and the date:

You have now heard instructions of the court . In the normal sequence of the matter we have closing arguments from counsel. Because the United States has the burden of proof the United States, you would think, would go last. Well, the, rules provide that is not the case. The rules provide that the United States goes first and last, with the defendant going second in closing argument.

The United States' second argument is simply a rebuttal argument, so I'm going to have the attorneys now present their arguments to you in that sequence.

APPENDIX B

CASE NO. 91-5143
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

JOAQUIN ORTEZ-MIRANDA
Defendent - Appellant

BEFORE: MILBURN and SUHRHEINRICH, Circuit Judges; JORDAN, District Judge

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgement and proceedings in the district court, and it is therefore ORDERED that said judgement be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

_____
Leonard Green, Clerk

The Honorable Leon Jordan, District Judge for the Eastern District of Tennessee, sitting by designation.

MANDATE ISSUED: 10/24/91

COST TAXED: NONE